

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

OCT 12 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0154-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GARY EUGENE YODER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200100007

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Gary Eugene Yoder

Florence
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Petitioner Gary Yoder seeks review of the trial court's order summarily dismissing a petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P.¹ We deny relief because we cannot say the trial court abused its discretion by dismissing

¹We are treating Yoder's "Review Rule 32 Dismissed by Superior Court" as a petition for review filed pursuant to Rule 32.9(c), Ariz. R. Crim. P.

the petition and thereby denying relief. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 After a jury trial, Yoder was convicted of first-degree burglary and three counts of aggravated assault with a deadly weapon. The trial court sentenced him to a presumptive prison term of 3.5 years on the burglary conviction, followed by consecutive, presumptive prison terms of 10.5 years on each count of aggravated assault, which were ordered to be served concurrently with one another. This court affirmed the convictions and sentences on appeal after Yoder challenged the sufficiency of the evidence to support the assault convictions. *State v. Yoder*, No. 2 CA-CR 2002-0043 (memorandum decision filed May 27, 2004).

¶3 In October 2005, the trial court dismissed Yoder's first petition for post-conviction relief, in which he had challenged his sentences based on, inter alia, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). He also challenged the consecutive terms as violative of A.R.S. § 13-116. Yoder challenged the trial court's ruling on review, and we denied relief. *State v. Yoder*, No. 2 CA-CR 2005-0380-PR (memorandum decision filed June 15, 2006). In August 2006, Yoder filed a second petition for post-conviction relief in propria persona. In the petition and in his reply to the state's response, he asserted, inter alia, the state's witnesses had not been truthful at trial, the trial judge had been biased, and the fact that he

had been seriously injured during the shooting that involved the police officer victims might have affected his competency at trial or sentencing.

¶4 The trial court denied relief summarily, finding the claims raised in this proceeding either had been raised or could have been raised in the previous appeal or post-conviction proceeding. The trial court was correct, and Yoder has not persuaded us otherwise or established any reason why he should not be precluded from raising the claims in this proceeding. *See* Ariz. R. Crim. P. 32.2. To the extent Yoder is raising claims for the first time in his petition for review, we will not address them because claims must be presented to the trial court first. *See generally* Ariz. R. Crim. P. 32.9. And to the extent Yoder's petitions below and on review raise ineffective assistance of appellate counsel, *see State v. Bennett*, 213 Ariz. 562, ¶¶ 14-16, 146 P.3d 63, 67 (2006), the trial court did not abuse its discretion by implicitly denying the claim. We grant the petition for review, but we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge